

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2019-289-A - ORDER NO. 2020-148

APRIL 28, 2020

IN RE: Rulemaking for the Public Service)	ORDER
Commission's Procedure to Employ, through)	PROMULGATING
Contract or Otherwise, Third-Party)	REGULATION 103-811
Consultants or Experts)	

This matter comes before the Public Service Commission of South Carolina (“Commission”) for consideration of promulgation of new Rule 103-811 providing the process for the Commission to engage and employ, through contract or otherwise, qualified independent third-party consultants or experts as required by 2019 Act No. 62, S.C. Code Ann. §§ 58-41-20(I) & 58-37-60, which is officially cited as 10 S.C. Code Ann. Reg. 103-811. The proposed Rule is necessary to provide a documented and transparent public process for employing, through contract or otherwise, qualified independent third-party consultants and experts for the Commission.

On May 9, 2019, the General Assembly passed South Carolina Energy Freedom Act (“Act 62”) that was signed into law by Governor Henry McMaster on May 16, 2019. 2019 Act. No. 62 (H.3659, R.82). With the passage of Act 62, the Commission now has greater access to resources and is authorized to hire external qualified, technical, independent experts or consultants to assist in the Commission’s evaluation of avoided cost rates, methodologies, terms, calculations, and conditions. S.C. Code Ann. § 58-41-20(I) states that the Commission “shall engage, for each utility, a qualified independent

third party to submit a report that includes the third-party's independently derived conclusions as to that third party's opinion of each utility's calculation of avoided costs for purposes of proceedings conducted pursuant to” S.C. Code Ann. § 58-41-20(I). Additionally, the Commission is exempt from complying with the State Procurement Code (Title 11, Chapter 35 of the South Carolina Code of Law) in the selection and hiring of a third-party consultant or expert authorized by this subsection. Any qualified independent third-party expert or consultant employed by the Commission is subject to the same *ex parte* prohibitions contained in Chapter 3, Title 58 as all other parties.

Also, S.C. Code Ann. § 58-37-60 was added by Act 62 which authorized the Commission to initiate an independent study evaluating the integration of renewable energy and emerging energy technologies into the electric grid for the public interest. S.C. Code Ann. § 58-37-60(A). The Commission was further provided the authority to hire or retain a consultant to assist with this independent study and that the Commission was exempt from complying with the State Procurement Code in the selection and hiring of the consultant authorized by this subsection. S.C. Code Ann. §58-37-60(B).

On September 4, 2019, Commission Staff filed a Notice of Drafting Regarding Rulemaking for the Public Service Commission’s Procedure to Employ, Through Contract or Otherwise, Third-Party Consultants or Experts. S.C. Code Ann. §§ 58-3-140, 58-37-60 & 58-41-20 (Supp. 2019). Then, on September 30, 2019, the Commission Staff subsequently filed draft language for Rule 103-811.

In the *State Register*, Volume 43, Issue 9, the Notice of Drafting was published regarding addition of a new Rule to provide a process for the Commission to engage qualified independent third-party consultants and experts. S.C. Code Ann. §§1-23-40(1) & 1-23-110; 43 *State Register*, Issue 9, pp. 26-27 (September 27, 2019). The Notice of Drafting contained the information required by S.C. Code Ann. § 1-23-110(A)(1)(a)-(c) about what is being drafted, the Commission's authority, and where interested persons may submit comments during the initial drafting period.

In their joint comments filed and dated November 8, 2019, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") proposed to broaden the scope of the proposed regulation by amending the draft regulation to add sections (F) and (G), which outline the role of the qualified, independent third-party consultant or expert and set forth the applicable procedural rules governing the involvement of a third-party consultant or expert in proceedings under S.C. Code Ann. §58-41-20(A) who are to report on the utilities' calculation of avoided costs that could be used by the Commission as provided by subsection (I) of S.C. Code Ann. §58-41-20. These changes offered in sections (F) and (G) addressed the entering of the third-party's report into the evidentiary record of the proceeding, and that the third-party expert or consultant would be subject to discovery by the parties. DEC and DEP also proposed that the new Rule should provide guidelines for submission of the third party's report to allow sufficient notice to permit discovery, deposition, and a meaningful opportunity for the parties to respond in pre-filed testimony and before the Commission in the evidentiary hearing.

Commission Staff subsequently incorporated the proposed changes submitted by DEC and DEP when adding sections (F) and (G) to proposed Rule 103-811, which was then filed later that day with the South Carolina Legislative Council on November 8, 2019.

On November 22, 2019, the new proposed Commission Rule 103-811 with added sections (F) and (G), along with a Statement of Need and Reasonableness, a preliminary Fiscal Impact Statement, and Notice of Public Hearing, was published in the *State Register* as required by law. 43 *State Register*, Issue 11, pp. 88-90 (November 22, 2019). The comment period for this Docket expired on December 27, 2019. The Notice of Public Hearing and Opportunity for Public Comment stated that the Commission had scheduled a hearing for January 29, 2020, at 2:30 p.m. to take place in the Commission's Hearing Room.

A hearing was held on January 29, 2020, at 2:30 p.m. in the Commission's Hearing Room, with the Honorable Comer H. "Randy" Randall, Chairman of the Commission, presiding. All jurisdictional documents were submitted into the record as a Hearing Exhibit, which was admitted into evidence. Jocelyn Boyd, Chief Clerk/Executive Director, outlined the proposed new Rule 103-811 to provide a public process for employing, through contract or otherwise, by the Commission of qualified independent third-party consultants and experts as provided in Act 62. *See*, S.C. Code Ann. §§58-37-60 & 58-41-20 (Supp. 2019).

At this hearing, Commission Staff requested that the proposed sections (F) and (G) of new Rule 103-811 be removed from the proposed regulation to be considered in

another rulemaking, Docket No. 2019-362-A, which pertains to the role of the third-party consultants or experts. Subsections (A) thru (E) of Rule 103-811 as originally noticed by the Commission concerns the procedure for employing, through contract or otherwise, the independent third-party consultant or expert and not their resulting role in a proceeding. Ms. Boyd even advised that on November 25, 2019, the Commission established Docket No. 2019-362-A, which was a rulemaking proceeding for the Commission to create a new Regulation 103-811.5 addressing the role of the qualified, independent third-party consultant or expert and the Commissioners' reliance on the contents of the qualified, independent third party consultant's or expert's report. The Commission has not yet filed a proposed rule in this other Docket, and comments on the Notice of Drafting were due by February 13, 2020, which was after the public hearing in this matter.

The parties to this Docket -- DEC, DEP, South Carolina Coastal Conservation League ("CCL"), Southern Alliance for Clean Energy ("SACE"), Johnson Development Associates, Inc. ("JDA"), and the Office of Regulatory Staff ("ORS") – supported the removal of sections (F) and (G) from proposed Rule 103-811 in this proceeding as stated by Commission Staff. Further, in accordance with requirements of S.C. Code Ann. § 1-23-111(A), discussion was also held during the hearing about how the rulemaking proceeding in Docket No. 2019-362-A for new Rule 103-811.5 would better serve as the regulation to incorporate the sections (F) and (G) regarding the role of the qualified, independent third-party consultant or expert, the parties procedural due process concerns,

and the Commissioners' reliance on the report generated by this third-party consultant or expert as part of the evidentiary record.

The record was held open for five (5) additional working days, thru February 5, 2020, following the end of the public hearing to allow for any written material to be submitted and recorded in the record of the public hearing. The Commission finds that it is reasonable to prepare a transcript of this hearing and therefore, orders the same.

On February 5, 2020, DEC and DEC filed additional written comments and a suggested change to the section (A) of Rule 103-811 due to the removal of sections (F) and (G) and to effectuate its comments from the public hearing about clearly communicating the purpose for which an independent third-party consultant or expert is hired. The suggested change to section (A) is to add the following language after the last sentence of section (A): "*An RFP issued pursuant to this rule will include a reference to any applicable rules or regulations that govern the role of the consultant.*" The Commission finds that this suggested change to section (A) is reasonable and necessary to ensure that future RFPs include a reference to the rules governing the role of the third-party consultant or expert, which will allow reference to any rules or procedures adopted by the Commission related to such consultants or experts, and therefore, orders the adoption and incorporation of the same into the Final Rule promulgated and submitted to the General Assembly for review.

The Commission finds that it is reasonable to adopt Ms. Boyd's request to remove sections (F) and (G) from proposed new Rule 103-811, which is also supported by DEC, DEP, CCL, SACE, JDA, ORS, and the evidence in this Docket. Therefore, the

Commission finds and orders that sections (F) and (G) shall be stricken and removed from this proposed new Rule 103-811 so that only sections (A) thru (E) shall be promulgated. The Commission further finds that nothing shall prohibit the Commission from considering in Docket No. 2019-362-A and Rule 103-811.5 the proposed sections (F) and (G) concerning the role of the qualified, independent third-party consultant or expert, the parties procedural due process concerns, and the Commissioners' reliance on the report generated by this third-party consultant or expert as part of the evidentiary record.

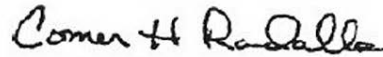
The Commission has considered this matter and finds that the proposed new regulation 103-811 is reasonable, including the changes to strike and remove subsections (F) and (G) of the proposed new Rule 103-811 as requested by Commission Staff, with no objection from the interested parties during the public hearing on January 29, 2020, and the change to add one clarifying sentence to the end of section (A).

The Commission further finds that the proposed new Regulation 103-811(A) thru (E), as revised herein, is needed in Article 8 of the Commission's Regulations to conform and implement the requirements of 2019 Act 62 regarding the engagement and employment of independent third-party consultants or experts by the Commission. Based on the record as a whole and S.C. Code Ann. §1-23-115(C)(1) through (3) and (9) through (11), the Commission determines and finds that the requisite need and reasonableness is met, and that the proposed new Regulation 103-811(A) thru (E), as revised, shall be promulgated.

IT IS THEREFORE ORDERED THAT:


1. New Rule 103-811(A) thru (E), as revised and proposed to be added to Article 8 of the Commission's regulations, is hereby promulgated.
2. Rule 103-811(A) thru (E), as revised, shall be submitted to the General Assembly for review pursuant to South Carolina law, S.C. Code Ann. §§ 1-23-111, 1-23-115, & 1-23-120.
3. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Comer H. "Randy" Randall, Chairman

ATTEST:



Jocelyn Boyd, Chief Clerk/Executive Director